IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 29

29

NATIONAL MUTUAL INSURANCE COMPANY
OF THE DISTRICT OF COLUMBIA,
Petitioner,

v.

TIDEWATER TRANSFER COMPANY,
INCORPORATED,
A Corporation of the State of Virginia,
Respondent.

BRIEF FOR RESPONDENT

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OPINIONS BELOW

The District Court of the United States for the District of Maryland did not file an opinion, but announced it was adopting its earlier opinion in *Feely v. Sidney S. Schupper Interstate Hauling System, Inc., and Breeding v. Same*, 72 Fed. Supp. 663 (1947). The majority (R. 10-18) and dissenting (R. 18-22) opinions of the United States Circuit Court of Appeals for the Fourth Circuit are reported at 165 F. 2d 531.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 31, 1947 (R. 22). The petition for a writ of certiorari was filed on March 3, 1948, and granted on March 29, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Now 28 U.S.C. 1254).

QUESTION PRESENTED

Is the Act of Congress of April 20, 1940, c. 117, 54 Stat. 143, constitutional insofar as it attempts to confer jurisdiction on the District Court of the United States for the District of Maryland to hear cases and controversies existing between a citizen of a State and a citizen of the District of Columbia?

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent agrees with Petitioner and The United States that the Statutory and Constitutional Provisions referred to by them have been drawn into issue in this case. Respondent submits, however, that the provisions of Art. I, Sec. 8, Cls. 17, 18, have no application to the question herein involved.

STATEMENT OF THE CASE

The statements of the case presented by Petitioner and The United States accurately summarize the circumstances of the instant litigation.

SUMMARY OF ARGUMENT

The Act of April 20, 1940, which attempts to confer jurisdiction on the District Court of the United States for the District of Maryland to hear cases or controversies

existing between citizens of the States and citizens of the District cannot be sustained under either Art. III or Art. I, Sec. 8, Cls. 17 and 18 of the Constitution.[1]

I.

Article III provides in pertinent part that Congress may create inferior federal courts to hear cases and controversies "between citizens of different States". In 1805 this Court, speaking through Chief Justice Marshall, held in *Hepburn & Dundas v. Ellzey*, 2 Cr. 445, that a citizen of the District of Columbia was not a citizen of a State within the meaning of that Article and therefore that the federal

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[1] The Constitutionality of the 1940 Act has been passed upon by eleven district courts and two circuit courts of appeals. It has been declared unconstitutional by the Circuit Court of Appeals for the Fourth Circuit in this case, and by the Circuit Court of Appeals for the Seventh Circuit in *Central States Cooperatives v. Watson Bros. Transportation Co.*, 165 Fed. 2d 392 (1947), petition for writ of certiorari filed April 17, 1948, No. 43, this Term; and by the following district courts: *McGarry v. City of Bethlehem*, 45 F. Supp. 385 (E. D. Pa. 1942); *Behlert v. James Foundation*, 60 F. Supp. 706 (S. D. N. Y. 1945); *Ostrow v. Samuel Brilliant Co.*, 66 F. Supp. 58 (D. Mass. 1946); *Wilson v. Guggenheim*, 70 F. Supp. 417 (E. D. S. C. 1947); *Feely v. Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663 (D. Md. 1947); *Willis v. Dennis*, 72 F. Supp. 853 (W. D. Va. 1947); see, also, *Federal Deposit Insur. Corp. v. George-Howard*, 55 F. Supp. 921 (W. D. Mo. 1944), reversed on other grounds, 153 F. 2d 591 (C. C. A. 8 1946), certiorari denied, 329 U. S. 719 (1946).

The Act was upheld in *Winkler v. Daniels*, 43 F. Supp. 265 (E. D. Va. 1942); *Glaeser v. Acacia Mutual Life Association*, 55 F. Supp. 925 (N. D. Calif. 1944). The Petitioner and the United States have cited the case of *Duze v. Woolley*, 72 F. Supp. 422 (D. Hawaii 1947) as likewise holding the 1940 Act constitutional. It is true that the Court in that case held the Act constitutional insofar as it authorized the district court of Hawaii to entertain suits between citizens of the states and citizens of the territories, etc. The Court, however, remarked that Congress could invest the Courts of the district of Hawaii with any jurisdiction deemed necessary by virtue of Article IV, Sec. 3, Cl. 2 of the Constitution. Indeed the Court suggested that the Act might be unconstitutional insofar as it attempted to extend the diversity jurisdiction of the Federal Courts in the states.

courts in the States could not entertain suits between a citizen of the District and a citizen of a State on the ground of diversity of citizenship. Only those members of the American Confederacy who are entitled to representation in Congress and to electors for the election of the President are "States" within the meaning of the Judiciary Clause of the Constitution, he said. And though he admitted that it was extraordinary that under the Constitution the Courts of the United States were closed to citizens of the District, he held that the Judiciary was powerless to alter the terms of that instrument. The remedy, he suggested, was by a legislative enactment proposing an appropriate amendment to the Constitution. And this construction of the diversity clause in Article III has been repeatedly affirmed by this Court in all of its later opinions on the subject.

And since Art. III of the Constitution limits the diversity jurisdiction of the federal courts in the States, Congress is without power to increase that jurisdiction by an ordinary Act such as the Act of April 20, 1940.

II.

Petitioner and The United States say that the 1940 Act may be sustained under the provisions of Art. I, Sec. 8, Cl. 17 of the Constitution which grants to Congress exclusive legislation over the District of Columbia and the citizens thereof. That grant of power, however, is specifically confined to the geographic boundaries of the District, and it may not extend beyond those limits, unless the power sought to be exercised is to accomplish a national purpose, as distinguished from a purpose to benefit the citizens of the District of Columbia alone. *Cohens v. Virginia*, 6 Wheat. 264 (1821). The power of Congress over District citizens is analogous to its national power over aliens, but this Court has repeatedly asserted that Congress may not

extend the jurisdiction of the Federal Courts to include suits to which aliens are parties beyond the express limits of Article III of the Constitution. *Hodgson v. Bowerbank*, 5 Cr. 303, 304 (1809).

And in any event, since the Act of 1940 would make a citizen of a State subject to suit in a federal court by a citizen of the District, then it has extended the jurisdiction of the State federal courts over citizens of the States beyond the limits of Article III of the Constitution. For, even should it be conceded that Congress may have the power under Art. I, Sec. 8, Cl. 17, to give the Federal Courts in the States jurisdiction over the citizens of the District, it may not so extend the Art. III jurisdiction of those courts insofar as citizens of the States are involved.

This Court held in *O'Donoghue v. United States*, 289 U. S. 516 (1933), that though Congress is empowered under Art. I, Sec. 8, Cl. 17, of the Constitution to extend the jurisdiction of the federal courts for the District of Columbia to include non-federal causes of action as well as administrative or legislative functions, it may not do so with the federal courts in the States. And a federal cause of action does not exist merely because a citizen of the District is involved.

If it is decided by this Court that Congress, under Art. I, Sec. 8, Cl. 17, was empowered to pass the Act of 1940, it would mean that since 1940, at least, every judgment rendered by a State Court in favor of or against a citizen of the District of Columbia is void, for want of jurisdiction in the State court to entertain the suit. Whatever power Congress has over the District and the citizens thereof, is exclusive of any power in the States to exercise concurrent power with respect thereto.

Should the Act of 1940 be sustained under the District Clause, the door would be opened to many other grave Constitutional questions.

ARGUMENT

I.

CITIZENS OF THE DISTRICT OF COLUMBIA ARE NOT CITIZENS OF A STATE WITHIN THE MEANING OF THE DIVERSITY CLAUSE OF ARTICLE III, SECTION 2 OF THE CONSTITUTION.

A. This Court in Hepburn and Dundas v. Ellzey So Decided.

Petitioner and the United States both contend that *Hepburn and Dundas v. Ellzey*, 2 Cr. 445 (1805), does not control the disposition of the constitutional question involved. It is their view that there Chief Justice Marshall merely decided that a citizen of the District of Columbia could not maintain a suit in the Circuit Court for the Virginia District, not because there was a constitutional inhibition against such Court assuming jurisdiction, but simply because the Congress of the United States had not seen fit, under the Judiciary Act of 1789 (1 Stat. 73), to extend the federal courts' diversity jurisdiction to include citizens of the District of Columbia, as well as citizens of different States.

We submit, however, that a full and proper reading of that opinion shows conclusively that a citizen of the District of Columbia is not a citizen of a *State* within the meaning of Article III, Section 2 of the Constitution, and, *a fortiori*, that Congress is without power to extend the constitutional concept of diversity of citizenship by the ordinary processes of legislation. It is significant that this same rule has been repeatedly announced by this Court. (*New Orleans v. Winter*, 1 Wheat. 91, 94 (1816); *Hooe v. Jamieson*, 166 U. S. 395 (1896); *Downes v. Bidwell*, 182 U. S. 244, 259 (1901);

Barney v. Baltimore City, 6 Wall. 280 (1867); *Metropolitan R. R. v. District of Columbia*, 132 U. S. 1 (1889); *O'Donoghue v. U. S.*, 289 U. S. 516, 543 (1933)). We do recognize, however, that Congress may properly initiate such an extension, if it chooses to exercise its extraordinary legislative right, *viz.*, to propose a constitutional amendment in accordance with the authority vested in it by Article V of the Constitution.

It is important to note that in the *Hepburn* case both the Plaintiffs and Defendant argued the jurisdictional question from the standpoint of Article III, Section 2. The Plaintiffs maintained that the term "State" as used in the Judiciary Act of 1789 had the same meaning as the word "States" in the Diversity Clause of the Constitution. They then cited numerous other sections of the Constitution where the word "States" was used, such as the full faith and credit clause (Article IV, Section 1), the clause prohibiting taxes or duties on exports (Article I, Section 9), the extradition clause (Article IV, Section 2), etc., and concluded that since "States" in those sections was obviously intended to include the District of Columbia then the same word when used in Article III, Section 2 should also be considered as including the District.

The defendant, on the other hand, contended (1) that the plaintiffs were not citizens of a State within the meaning of Article III, Section 2, and (2) that, in any event, the Judiciary Act was not intended to include citizens of the District and the Court, therefore, could take no jurisdiction which was not given by the Act.

With these arguments before it, the Court proceeded to determine whether the Circuit Court for the District of Virginia had jurisdiction.

The Chief Justice acknowledged that the District of Columbia, as a distinct political society, was "a State" according to the definitions of writers on general law. But, he said, the District of Columbia is not a State *within the meaning of the Constitution*, as that term included only the members of the American Confederacy; that is, those who are entitled to representation in the Senate and House of Representatives and those who are entitled to electors for the election of the President. He then added with respect to the representation and electoral clauses:

> "These clauses show that the word State is used in the constitution as designating a member of the union and excludes from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it."

And in disposing of the plaintiff's argument that the word "States" as used in other parts of the Constitution included the District, the Chief Justice said:

> "Other passages from the Constitution have been cited by the plaintiffs to show that the term State is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them."

How then can it be contended that the opinion of the Chief Justice was confined simply to the ruling that the Judiciary Act of 1789 did not permit suits by citizens of the District of Columbia in the federal courts?

But why, it is asked, did the Court approach the question before it by saying that it was necessary to look to the Judiciary Act of 1789, as the jurisdiction of the Circuit

Court "depends on the Act of Congress describing the jurisdiction of that Court"? The answer is clear. The Chief Justice recognized what has been declared to be the well-established rule that Article III of itself does not confer jurisdiction of any nature on the inferior federal courts created by Congress. Congress could, as it saw fit, grant to or withhold from such tribunals all or any part of the federal jurisdiction, defined in Article III, Section 2. As stated by this Court in *Kline v. Burke Construction Co.*, 260 U. S. 226, 234 (1922):

> "The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases but it requires an act of Congress to confer it."

For the purpose of orderly procedure, therefore, the Chief Justice remarked, and properly so, that the first point of consideration was whether Congress in exercise of its power had bestowed on the Circuit Courts jurisdiction over the case in question. In order to resolve that question, it became necessary, said the Court, to interpret the word "State" as used in the Judiciary Act. But in so doing it was imperative to view that word in the light of how the term was used in the Judiciary Clause of the Constitution. If "States" as used in that instrument included the District of Columbia, then it would follow that Congress by the use of that same term had conferred the questioned jurisdiction on the Circuit Courts. If it did not include the District, then Congress had not granted this jurisdiction to those Courts.[2]

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[2] That Congress could not grant such jurisdiction in the latter instance is made abundantly clear by the Chief Justice's later ruling in *Hodgson v. Bowerbank*, 5 Cr. 303, 304 (1809) where he said: "Turn to the Article of the Constitution of the United States, for the Statute cannot extend the jurisdiction beyond the limits of the Constitution."

When we recall the statement of the Chief Justice, that *"as the Act of Congress obviously uses the word 'State' in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument"*, it is apparent that it was there specifically decided that the District was not a State within the meaning of Article III, Section 2 of the Constitution. Cf. *Williams v. U. S.*, 289 U. S. 516, 573 (1933).

But the assertion is made that the Chief Justice's remark "but this is a subject for legislative not for judicial consideration", was an invitation to Congress to remedy the situation by giving the District of Columbia the status of a State for the purpose of diversity jurisdiction. It is perfectly obvious, however, that what the Chief Justice meant was that it was without the scope of the Judiciary to alter the express terms of the Constitution, but that Congress, if it deemed it necessary and advisable, could under the extraordinary legislative power vested in it by Article V of the Constitution initiate a change in Article III, Section 2 by proposing a constitutional amendment so as to specifically bring the District and the citizens thereof within the provisions of that Section. It is significant that at that time, there had already been twelve amendments to the Constitution, all of which had been proposed by Congress and ratified by the legislatures of the various States. And it was in this sense that the Chief Justice used the term "legislative". It is true that a constitutional amendment is extraordinary legislation, but that it is legislative in nature was recognized by Chief Justice Marshall in *Marbury v. Madison*, 1 Cr. 137, 177 (1803), where, after deciding that the jurisdiction attempted to be conferred on the Supreme Court by Section 13 of the Judiciary Act of 1789 was not authorized by Article III, he said:

> "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level

with *ordinary legislative acts*, and like other acts is alterable when the legislature shall please to alter it." (Italics added.)

And the same distinction was earlier made by Justice Chase in *Hollingsworth v. Virginia*, 3 Dall. 378 (1798), where, in upholding the eleventh amendment (which incidentally amended Article III, Section 2), he stated:

> "The negative of the President applies only to the *ordinary cases of legislation:* He has nothing to do with the proposition, or adoption of amendments to the Constitution." (Italics added.)[3]

If, therefore, after the passage of 135 years, Congress has suddenly decided that it is imperative to extend the diversity jurisdiction of all of the Federal District Courts to include suits to which a citizen of a District is a party, then let it accept the "invitation", if such it was, to propose an amendment to Article III, Section 2 of the Constitution for that purpose.[4]

B. Other Cases Holding Citizens of the District Not Within Diversity Clause of Constitution.

We are told that the cases following *Hepburn & Dundas v. Ellzey* do not say that the District of Columbia is not a State within the meaning of Article III, Section 2 of the Constitution, but only that citizens of the District could not be parties to diversity suits in the Federal Courts under

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[3] See further: *Wilson v. Guggenheim*, 70 F. Supp. 417 (E. D. S. C. 1947); and *Willis v. Dennis*, 72 F. Supp. 853, 855 (W. D. Va. 1947) where the words of the Chief Justice were construed to mean that the Judiciary was powerless to modify the constitutional limitations.

[4] Indeed, we understand that Senator Wiley of Wisconsin, the Chairman of the Senate Committee on Judiciary, has stated that he will introduce an Act in Congress proposing such an amendment if this Court should affirm the order appealed from in the present case. (Washington Sunday Star, January 4, 1948, p. A-1, Col. 4.)

the then existing Judiciary Acts. We need but look to these later decisions, however, to find that such is not the case. In *New Orleans v. Winter*, 1 Wheat. 91, 94 (1816), where the question arose as to whether a citizen of the Territory of Louisiana was a citizen of a State within the meaning of Article III, Section 2 Chief Justice Marshall, in holding that he was not, declared:

> "It has been attempted to distinguish a *Territory* from the *District of Columbia;* but the Court is of opinion that this distinction cannot be maintained. *They may differ in many respects, but neither of them is a state in the sense in which the term is used in the constitution.*" (Latter italics added.)

Later in *Metropolitan R.R. v. District of Columbia*, 132 U. S. 1 (1889) this Court discussed at length the distinction between the status of the District of Columbia as a State in the sense of being a distinct political society and its status as a "State" within the meaning of the Judiciary Clause of the Constitution, and noted:

> "One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate State or sovereignty according to the definition of writers on public law, being a distinct political society. This position is assented to by Chief Justice Marshall, speaking for this court, in the case of Hep. v. Ell., 2 Cranch, 445, 452, where the question was whether a citizen of the District could sue in the Circuit Courts of the United States as a citizen of a State. The Court did not deny that the District of Columbia is a State in the sense of being a distinct political community, but held that the word 'State' *in the Constitution*, where it extends the judicial power to cases between citizens of the several 'states', refers to the States of the Union. Therefore, whilst the District may, in a sense be called a state, it is such in a very qualified sense."

And in 1896, Mr. Justice Fuller in *Hooe v. Jamieson*, 166 U. S. 395, reaffirmed the same rule, stating at page 397:

> "We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in *Hepburn v. Ellzey*, 2 Cranch, 445, Feb. Term 1805 *'that the members of the American Confederacy only are the states contemplated in the Constitution'; that the District of Columbia is not a State within the meaning of that instrument;* and that the Courts of the United States have no jurisdiction over cases between citizens of the District of Columbia and citizens of a State." (Italics added.)

Similarly in *Downes v. Bidwell*, 182 U. S. 244, 259 (1901) Justice Brown stated:

> "The earliest case is that of *Hepburn v. Ellzey*, 2 Cranch 445, in which this Court held that, under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different states, a citizen of the District of Columbia could not maintain an action in the Circuit Court of the United States."

See also *O'Donoghue v. U. S.*, 289 U. S. 516, 543 (1933) where Justice Sutherland acknowledged as an established proposition:

> "That the District of Columbia and the territories are not states, *within the judiciary clause of the Constitution* giving jurisdiction in cases between the citizens of different States." (Italics added.)

And as was said by Mr. Justice Nelson in *Prentiss v. Brennan*, #11, 385, 19 Fed. Case 1278 (1851):

> "A person may be a citizen of the United States and not a citizen of any particular State. *This is the condition of citizens residing in the District of Columbia* and in the territories of the United States or who have taken up residence abroad and others that might be mentioned." (Italics added.)

Thus, despite the denials of the Petitioner and the United States, it is apparent that the Court in these later cases specifically held that a citizen of the District was not a citizen of a "State" within the meaning of the diversity clause of the Constitution. It is of particular significance that in none of those cases was any reference made to the Judiciary Act of 1789, or to any other Judiciary Act.[5]

In further support of their argument that the District is included within the meaning of "States" in the Diversity Clause, Petitioner and The United States have repeatedly asserted that the word "State" as used in other parts of the Constitution has been construed in many instances by this Court to include the District. We submit, however, that a review of the cases they cite indicates the contrary.

For instance, in *Loughborough v. Blake*, 5 Wheat. 317 (1820), Chief Justice Marshall did not hold that the District of Columbia was a State for purposes of direct taxation by Congress under Article I, Section 2, Clause 3. What the Chief Justice did say was that the general grant of power to Congress to lay and collect taxes was made in such broad terms as to include the District of Columbia and the territories as well as the States. He then went on to say that even if the general language of the Constitution as to taxation should be confined to the States, still Article I, Section 8, gives Congress the power to exercise exclusive legislation in all cases whatsoever *in* the District of Columbia, and that in any event, Congress would therefore have the power to lay and collect taxes in that District. As a matter of fact, the Chief Justice, in speaking of the constitutional limitation on direct taxation, said:

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[5] See further:—*Barney v. Baltimore*, 6 Wall. 280 (1868); *Slaughter-House Cases*, 16 Wall. 36, 73, 74 (1873); *Anderson v. U. S. Fidelity & Guaranty Co.*, 8 Fed. (2d) 428, 429 (D. C. S. D.-Fla. 1925); Willoughby, *Constitution of the United States* (2d Ed.) Vol. I, p. 346, sec. 194.

> "If * * * a direct tax be laid at all, it must be laid on every State conformably to the rule provided in the Constitution. Congress has clearly no power to exempt any State from its due share of the burden. *But this regulation is expressly confined to the States, and creates no necessity for extending the tax to the District or Territories.*" (Italics added.)

Stoutenburgh v. Hennick, 129 U. S. 141 (1889), is cited as holding that the District is a State within the meaning of the Congressional power over commerce among the several "States". We again submit that this Court did not so hold, but in fact held that the District of Columbia was a municipality and that Congress could legislate with respect to commerce *in* the District of Columbia by virtue of the authority granted to it over the District by Article I, §8, Cl. 17, of the Constitution. (See: Note (1904) II Michigan Law Review 468.)

Nor was it held in *Embry v. Palmer*, 107 U. S. 3 (1883), that the District of Columbia was a "State" as that word is used in the full faith and credit clause of the Constitution. The decision was based upon other applicable provisions of the Constitution wherein the word "State" was not employed. See: Willoughby, *Constitution of The United States* (2d Ed.) Vol. I, p. 256, Sec. 145.

And in *Geofroy v. Riggs*, 133 U. S. 258 (1890), this Court, in order to give effect to the reciprocal provisions of the Treaty with France, held that the words, "the States of the Union" within the meaning of that treaty were intended to include all distinct political societies and not only the States making up the American Confederacy. The Court specifically recognized the doctrine enunciated in the *Hepburn* case that the District of Columbia is not a State as that term is used in the Constitution, though recog-

nizing that it may be a State in the sense that it is a distinct political society.

We do not wish to burden the Court with a discussion of all of the cases cited by Petitioner and The United States on this point. Suffice it to say, we contend that none of the cases cited prove the point sought to be proved.

In fact, a similar argument was made by counsel for the Plaintiffs in the *Hepburn Case* which, as noted above, was summarily dismissed by Chief Justice Marshall when he said:

> "Other passages from the Constitution have been cited by the Plaintiffs to show that the term 'State' is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them."

In passing, we wish to point out the very apt observation of Coleman, J., in *Feely v. Schupper, etc.*, 72 F. Supp. 663 (Md. 1947) where the same argument was presented in an attempt to sustain the very act which is now before the Court. Judge Coleman said:

> "But this argument overlooks the fact that, with respect to an interpretation of the phrase 'between Citizens of different States' as it appears in the Constitution, Art. III, Sec. 2, the Supreme Court *has* been consistent in holding that the District of Columbia was *not a State*. Hooe v. Jamieson, supra; Barney v. Baltimore City, supra, Hepburn v. Ellzey, supra; see also O'Donoghue v. United States, supra, at p. 543. If, prior to the 1940 amendment to 28 U.S.C.A. Sec. 41 (1), the District of Columbia was not a State, in the sense that that word is used in the diversity of citizenship clause of the Constitution, can it be said that now, after the 1940 amendment to the judiciary code, the Constitution means something different merely by reason of a

> construction placed upon it by Congressional legislation? The Constitution, being supreme, is not subject to mere legislative revision."[6]

And in addition to the overwhelming authority of the earlier cases, the Courts in more recent decisions have indicated that no other result could now be reached in view of the Fourteenth Amendment. These cases point out that diversity of citizenship as required by Art. III, Sec. 2, is lacking unless the parties are citizens of different States in the sense that that term is used in the Fourteenth Amendment. In other words, it is recognized that there is a difference between citizenship of the United States and citizenship of a State and it is the latter citizenship that is required for purposes of diversity jurisdiction.

Thus in *Bankers' Trust Company v. Texas and Pacific Railway*, 241 U. S. 295 (1916), where the question of jurisdiction in the Federal Courts under the diversity clause arose, Justice Van Devanter, speaking for this Court said:

> "Whether this is a suit between citizens of different states turns upon whether the Texas and Pacific Company is a citizen of Texas. It is doubtful that the pleader intended to state a case of diverse citizenship, but, be this as it may, we are of opinion that the Company is not a citizen of any State. * * * Of course, it is a citizen of the United States in the sense that a Corporation organized under the laws of one of the States is a citizen of that State, but it is not within the clause of the Fourteenth Amendment which declares that

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[6] We ought not overlook the many pronouncements of this Court that in cases of doubt, the "solemn, deliberate, well considered and long settled decisions of the judiciary and the quiet assent of the people to an unbroken and unvarying practice ought to conclude the action of Courts in favor of a principle so established, even when the individual opinions of the judges would be different were the question *res integra*." *Veazie Bank v. Fenno*, 8 Wall. 533, 541-2 (1869); *Wilkinson v. Leland*, 2 Pet. 627, 657 (1829); *Missouri v. Illinois*, 180 U. S. 208, 219 (1901).

native born and naturalized citizens of the United States shall be citizens of the state wherein they reside

Though he may be a naturalized citizen of the United States, he is not domiciled in any state, and he is not a citizen of any state, under the Fourteenth Amendment. To sue in a Federal District Court, it is not enough to be a citizen of the United States. One must be a citizen of a state."[7]

This case clearly indicates that for purposes of diversity jurisdiction the parties must be citizens of actual States admitted to the Union and not merely citizens of a fictional "State" such as Congress has attempted to make the District of Columbia by the Act of 1940. (See also: *Schick v. United States*, 195 U. S. 65, 68 (1904).)

But Petitioner insists that the citizens of the District of Columbia were, before the cession, citizens of Maryland or Virginia, and thus entitled to the advantages and benefits intended by the diversity clause of Article III, Section 2 and that, therefore, these constitutional assurances of the diversity clause should not be taken from them. The reason for such a conclusion, however, is not apparent to us. Surely, the Petitioner did not mean to say that because the District of Columbia consists of the territory ceded by the States of Virginia and Maryland that the inhabitants of the District have the status of citizens of a State. This very question was decided to the contrary by Chief Justice Marshall in *Reily v. Lamar* 2 Cr. 344 (1805), where he stated:

"By separation of the District of Columbia from the State of Maryland the complainant ceased to be a citizen of that State, his residence being in the City of Washington at the time of that separation."

[7] And note that in *Neild v. District of Columbia*, 71 App. D. C. 306, 316, 110 F. 2d 246, 256, it was held that the Fourteenth Amendment is not applicable in the District of Columbia, since it is not a State. See also: *Hurd v. Hodge*, 334 U. S. 24 (1948).

Yet Petitioner has quoted extensively from *Downes v. Bidwell*, 182 U. S. 244, 260-261 (1901), and *O'Donoghue v. United States*, 289 U. S. 516, 540 (1933), with the apparent intention of creating the impression that citizens of the District retained their status as citizens of a State following the cession. However, it is clear from the passages quoted that what the Court said was that citizens of the District retained their status as citizens *of the United States*. Nowhere does the Court in either case suggest that the citizens of the District retain their status as citizens of a State. In fact, it specifically held otherwise. Indeed, as has already been pointed out, Justice Sutherland in the *O'Donoghue* case cited with approval the conclusions arrived at by Justice Brown in *Downes v. Bidwell, supra*, one of which was:

> "'That the District of Columbia and the territories are not States, within the judicial clause of the Constitution, giving jurisdiction in cases between the citizens of different States.'"

If the Petitioner's reasoning be based solely on principles of equality, such a contention is aptly answered in *Central States Co-ops v. Watson Bros. Transp. Co.*, 165 F. (2d) 392, 397 (C. C. A. 7th 1947) where in holding the Act of 1940 unconstitutional the Court said:

> "The argument that the citizens of the District of Columbia are entitled to the same rights and privileges as those of the States, including that provided by the amendment with which we are now concerned, is appealing, but it is of little if any consequence relative to the question with which we are now confronted. In response to a similar argument, the court in Feeley v. Sidney S. Schupper Inter-State Hauling System, supra, stated D. C. 72 F. Supp. at page 667:
>
> "'The District of Columbia, by reason of its being the seat of the national government and under the exclusive jurisdiction of Congress by Article I, Section

8, Clause 17, is totally unlike any other governmental area in our union. It is not like a State, it is not like a territory. It is an area that is in a class by itself. Its anomalous position has been repeatedly recognized by the Courts. (Citing cases.) The prima facie discrimination against residents of the District, therefore, loses substance when it is considered in the light of a wholly exceptional situation, created by the framers of the Constitution out of necessity for a national capitol, from whose very nature flow many unusual consequences.'"

Moreover, if the Petitioner's contention be correct, then a similarly valid argument is that, since the citizens of the District, before the cession, were entitled to vote for representatives in Congress and for electors for the election of the President, then they are now likewise entitled to the same rights and advantages in those respects.

The simple proposition is that the citizen of the District cannot claim all the rights and advantages enjoyed by the citizens of the States, nor can there be imposed upon citizens of the District all the duties and burdens imposed upon citizens of the State, because citizens of the District are not citizens of a State.

A further attempt has been made to bolster the argument that the District is a State within the meaning of the diversity clause by stating that that clause was intended to offer to all non-residents of a particular State full opportunity for the settlement of disputes removed from local prejudices and influences, and that, therefore, citizens of the District were obviously intended to be included therein. This argument reflects the view expressed by Judge Parker in his dissenting opinion in the Circuit Court of Appeals in this case to the effect that the 1940 Act is obviously dictated by the most basic considerations of justice and that the same reasons for making the Federal District Courts

available to the citizens of the 48 states likewise apply to the citizens of the District (R. 18, 19). But such an argument does not, as remarked by Judge Coleman in the *Schapper* case, meet the constitutional point involved. Judge Coleman said that in view of *Erie Railroad Co. v. Thompkins*, 304 U. S. 64 (1938) citizens of the District of Columbia are not in such an unfavorable position as the proponents of the Act of 1940 suggest. Citizens of the District, he said, may still sue in the Courts of the District of Columbia and in the State Courts, and since the *Thompkins* case requires the Federal Court to apply the State law as declared by the highest State Court, then citizens of the District should not suffer any substantial disadvantage from having to sue in a State Court.[8] He also reminds us that whenever a federal question is involved, a citizen of the District of Columbia may sue in the Federal Courts; and that by virtue of the Fourteenth Amendment he is protected against any State abridgement of his privileges and immunities as a citizen of the United States as well as against any deprivation by a State of due process of law or of the equal protection of the laws.

Moreover, we need hardly mention that arguments as to the desirability or practicality of the 1940 Amendment

[8] See also Walker, *Citizens of the District of Columbia and the Federal Diversity Jurisdiction*, (1948) 15 D. C. Bar Assn. J. 55, 63, in answer to the same argument where it was pointed out that the Citizens of the District of Columbia endured the "discrimination" for 135 years without material outcry, during most of which period "the right to resort to Federal Courts was often of substantial importance because the Federal Courts apply their own doctrines of general law". Mr. Walker also notes that the right not to be compelled to litigate in the Federal Forum is often regarded as a valuable right of the District citizen, noting that in *Glaeser v. Acacia Mutual Life Assn.*, 55 F. Supp. 925 (N. D. Calif. 1944); *Wilson v. Guggenheim*, 70 F. Supp. 417 (E. D. S. Car. 1947); and *Duze v. Woolley*, 72 F. Supp. 422 (D. Hawaii 1947) the attack on the constitutionality of the 1940 Amendment was made by the party who was a citizen of the District and who did not want to litigate in the Federal Court.

is of no avail in a case of this kind where the only question is whether Congress has exceeded the limits of the authority conferred on it by the Constitution. As Mr. Justice Murphy recently remarked in his dissenting opinion in *Adamson v. California*, 332 U. S. 46, 125 (1947): "Much can be said pro and con as to * * * desirability * * *. But policy arguments are to no avail in the case of a clear constitutional command."

II.

CONGRESS IS WITHOUT POWER TO ENLARGE THE DIVERSITY JURISDICTION OF THE DISTRICT COURT FOR THE DISTRICT OF MARYLAND BEYOND THE LIMITS OF ARTICLE III, SECTION 2 OF THE CONSTITUTION.

Since the District of Columbia is not a State within the meaning of Article III, Section 2 of the Constitution, then Congress may not extend the jurisdiction of the Federal District Court for the District of Maryland to include controversies between a citizen of a State and a citizen of the District of Columbia.

This doctrine was firmly established by Chief Justice Marshall in the case of *Hodgson v. Bowerbank*, 5 Cr. 303 (1809). In that case, the plaintiff had been described in the bill of complaint as an alien, but no allegation was made that the defendant was a citizen of some one of the United States. The Judiciary Act of 1789 purported to give jurisdiction to the Circuit Courts in all suits in which an alien was a party. Article III, Section 2 of the Constitution provided, however, that the federal courts should have jurisdiction in all suits between aliens and a citizen of a State. Chief Justice Marshall in holding that Congress was without power to confer jurisdiction on the Circuit Courts in *all* suits in which an alien is a party, said:

> "Turn to the Article of the Constitution of the United States, for the Statute cannot extend the jurisdiction beyond the limits of the Constitution."

The *Hodgson* case is particularly apposite for Congress had there attempted to extend the jurisdiction of federal courts to include cases or controversies existing between parties not contemplated within Article III, Section 2, just as the Congress by the Act of April 20, 1940 has attempted to extend the jurisdiction of federal courts to include cases or controversies existing between parties not contemplated within that same Article and Section. As the first Act of Congress was unconstitutional, so also is the Act in this case.

As was appropriately said by this Court in *Kline v. Burke Construction Co.*, 260 U. S. 226, 233-234 (1922):

> "By Sec. 2 of Article III it is provided that the judicial power shall extend to certain designated cases and controversies and, among them, 'to controversies * * * between citizens of different States * * *'. The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies, *but to delimit those in respect of which Congress may confer jurisdiction upon such Court as it creates* * * *. That body may give, withhold, or restrict such jurisdiction in its discretion, *provided it be not extended beyond the boundaries fixed by the Constitution.* * * *. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases but it requires an act of Congress to confer it." (Italics added.)[9]

[9] See also *Levin v. U. S.*, 128 Fed. 826, 829-831 (C. C. A. 8th 1904) where Judge Sanborn stated that the judicial power granted by Section 1 of Article III extended only to the trial of the classes of cases enumerated in Section 2. And see: *Marbury v. Madison*, 1 Cr. 137 (1803); *Muskrat v. U. S.*, 219 U. S. 346 (1911); *Postum Cereal Co. v. California Fig-Nut Co.*, 272 U. S. 693, 700, (1927); *Ex Parte Bakelite Corp.*, 279 U. S. 438, 449 (1929); *Williams v. U. S.*, 289 U. S. 553, 565 (1933); *O'Donoghue v. U. S.*, *supra*; *Lockerty v. Phillips*, 319 U. S. 182, 187 (1943); Dobie, *Federal Procedure* (1928), Sec. 14; McGovney, *A Supreme Court Fiction* (1943) 56 Harvard Law Review 853, 854-855; 1 Moore, *Federal Practice*, Sec. 0.08.

III.

THE ACT OF APRIL 20, 1940, CANNOT BE SUSTAINED UNDER THE PROVISIONS OF ARTICLE I, SECTION 8.

Judge Parker, dissenting in the court below, admitted that the District of Columbia is not a State within the meaning of Article III, Section 2, but asserted that the words in that section must be construed in connection with other provisions of the Constitution, as they are not words of limitation and do not by implication exclude jurisdiction in those classes of cases not therein enumerated but permissible under other sections (R. 19-20). He then said that Congress has the power under Article I, Section 8, Clause 17 to grant to citizens of the District the right to sue and be sued in all Federal Courts.

It is apparent, however, from the very wording of this Clause that the power conferred on Congress is limited to the geographical area constituting the District, for Article I, Section 8, Cl. 17 empowers Congress:

> "To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, * * *."[10]

The Clause itself specifically provides that Congress shall have exclusive legislation "over" the District, "as may * * * become the Seat of the Government of the United States" and contains the further proviso that such District shall

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[10] It is a well established rule that in expounding the Constitution every word must have it due force and appropriate meaning; no word was unnecessarily used and needlessly added. Every word appears to have been weighed with the utmost deliberation. No word in the instrument, therefore, can be rejected as superfluous or without meaning. *Holmes v. Jennison*, 14 Pet. 540, 571 (1840); *Williams v. U. S.* 289, U. S. 553, 572 (1933); see further: *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

not exceed "ten Miles square". It is, therefore, obvious that the framers of the Constitution intended that the power of Congress with respect to the District was to be limited to the actual geographical boundaries of that District. It is, of course, axiomatic that when the text of a constitutional provision is not ambiguous, where its meaning is plain and clear, the Courts are not at liberty to search for its meaning beyond the instrument itself. (*Dartmouth College v. Woodward*, 4 Wheat. 518, 644 (1819); *Fairbank v. U. S.*, 181 U. S. 283, 307 (1901).)

It was not by mere accident that the words "over such District (not exceeding ten Miles square) as may * * * become the Seat of the Government of the United States" were employed.[11]

The underlying reason for the insertion and adoption of this Clause in the Constitution was to insure that the Government would be free from the insults or undue influence of any particular State. The members of the Convention were mindful of the situation so well described by Mr. Iredell of North Carolina (Elliot, *Debates on the Federal Constitution*, Vol. IV, p. 219) who, in support of the District clause, said:

> "What would be the consequence if the Seat of the Government of the United States, with all the archives of America, was in the power of any one particular state? Would not this be most unsafe and humiliating? Do we not all remember that in the year 1783, a band of soldiers went and insulted Congress? The

[11] As originally proposed in the Convention and referred to a Committee on August 18, 1787 the Clause read: "To exercise exclusively legislative authority at the Seat of the General Government, and over a District around the same, not exceeding . . . . square miles, the consent of the legislature of the State or States comprising such district being first obtained." Elliot, *Debates on the Federal Constitution*, Vol. I, p. 247 (1861).

sovereignty of the United States was treated with indignity. They applied for protection to the State they resided in but could obtain none. It is to be hoped such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself."[12]

Although the members of the various State Ratifying Conventions generally recognized the desirability and necessity of giving Congress complete authority at the Seat of the Government, the inclusion of the District Clause was the source of much debate. A few were apprehensive that the Clause might be so interpreted as to enable Congress to grant exclusive privileges to citizens of the District, or to extend the powers of Congress therein granted beyond the District, thereby augmenting the general powers granted to it by other provisions of the Constitution. And they therefore suggested that it would be advisable to insert a Clause negating any power other than that expressly contained therein. (Elliot, *id*, Vol. III, pp. 431, 436, 454—remarks of Messrs. Grayson, Patrick Henry and Tyler.)

It was concluded, however, that since the exclusive power was specifically confined to the ten Miles square, Congress was "excluded as much from the exercise of any other authority as they could be by the strongest negative clause that could be framed", and therefore, further words of limitation were unnecessary. (Elliot, *id*, Vol. IV, p. 219—Mr. Iredell.)

And Mr. Madison, in answer to Mr. Grayson, was careful to point out that the Clause as worded did not give Congress any supplementary power or the power to impede the operation of any other part of the Constitution. He said:

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[12] See a similar statement by Mr. James Madison of Virginia. Elliot, *id*, Vol. III, p. 432-3.

"I cannot comprehend that the power of legislation *over a small district, which cannot exceed ten Miles square*, and may not be more than one mile, will involve the dangers which he apprehends. * * * Let me remark, if not already remarked, that there must be a cession, by particular states, of the district to Congress, and that the States may settle the terms of the cession.

If that latitude of construction which he contends for were to take place with respect to the sweeping clause, there would be room for those horrors. *But it gives no supplementary power. It only enables them to execute the delegated powers.* If the delegations of their powers be safe, no possible inconvenience can arise from this clause. * * *

"As the consent of the state in which it may be must be obtained, and as it may stipulate the terms of the grant, *should they violate the particular stipulations it would be an usurpation;* so that, if the members of Congress were to be guided by the laws of their country, none of those dangers could arise." (Italics added.) (Elliot, *id.*, Vol. III, pp. 432-3, 438.)

Probably the clearest statement of the limited scope of the District Clause was expressed by Mr. Pendleton of Virginia. He said:[13]

"Mr. Chairman, this clause does not give Congress power *to impede the operation of any part of the Constitution, or to make any regulation that may affect the interests of the citizens of the union at large.* But it gives them power over the local police of the place, so as to be secured from any interruption in their proceedings. Notwithstanding the violent attack upon it, I believe, sir, this is the fair construction of the

[13] Elliot, *id.*, Vol. III, pp. 439-40; see also remarks of Mr. Hamilton, The Federalist, No. XLIII, p. 2. Cf. *Curry v. D. C.*, 14 App. D. C. 423 (1899) where it was held that Congress is without power under this clause to grant exclusive hacking privileges in the District.

clause. It gives them power of exclusive legislation in any case *within* that district. What is the meaning of this What is it opposed to? Is it opposed to the general powers of the federal legislature, or to those of the state legislatures. *I understand it is opposed to the legislative power of that State where it shall be.* What, then is the power? Is it, that Congress shall exclusively legislate there, in order to preserve the police of the place and their own personal independence, that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the State where it shall be. * * *

"Why oppose this power? Suppose it was contrary to the sense of their constituents to grant exclusive privileges to citizens residing within that place; the effect would be directly in opposition to what he says. *It could have no operation without the limits of that district.* Were Congress to make a law granting them an exclusive privilege of trading to the East Indies, *it could have no effect the moment it would go without that place; for their exclusive power is confined to that district.* Were they to pass such a law, it would be nugatory; and every member of the community at large could trade to the East Indies as well as the citizens of the district. *This exclusive power is limited to that place solely, for their own* preservation, which all gentlemen allow to be necessary." (Italics added.)

These remarks are of the utmost importance, when we consider the fact that immediately following them no further comments were made with respect to the inclusion of the District clause in the Constitution and the debates then shifted to the necessary and proper clauses.[14]

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[14] Furthermore, the members of the New York Convention ratified the Constitution under the following impression: "That the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by Congress, is not in any case to be increased, enlarged or extended by any fiction, collusion or mere suggestion * * *" (Elliot, *id.* Vol. 1, p. 329.)

The proponents of the 1940 Act, however, would have us believe that the clause has been interpreted differently by this Court, and that in fact Chief Justice Marshall, who was a member of the Constitutional Conventions which expressly limited the operation of clause 17 to the ten Miles square, held that the power of Congress under the clause in question was not confined to the District. They rely strongly on his statement in *Cohens v. Virginia*, 6 Wheat. 264, 424 (1821) that:

> "This power, like all others which are specified, is conferred on Congress as the legislature of the Union, for strip them of that character and they would not possess it. In no other character can it be exercised. In legislating for the District, they necessarily preserve the character of the legislature of the Union; for it is in that character alone that the Constitution confers on them this power of exclusive legislation."

Thus, they say, since Congress acts as a national legislature, it can enact any and all legislation which it deems necessary for the welfare of the District and the citizens thereof, irrespective of the other limitations contained in the Constitution.

Not only is this view pregnant with danger in that it opens the door to Congress to by-pass the other provisions and prohibitions of the Constitution under the guise of exercising exclusive legislation over the District, but it throws into utter disharmony the *Cohens* Case and the many other decisions of this Court on the question. Our view of the case, however, harmonizes the opinions of the members of the Constitutional and State Ratifying Conventions as well as all of the cases on the subject.

The error of Petitioner's argument is apparent. It is true that Congress may within limits legislate nationally

for the benefit of all of the citizens of the *United States*. But when it legislates solely for the benefit of the citizens of the District, it does so in the same character as any State legislates for its citizens; that is, it acts as a local legislature. *Pollard's Lessee v. Hagan*, et al, 3 How. 212 (1845); *Capital Traction Company v. Hof*, 174 U. S. 1, 5 (1899); *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 435 (1932); *O'Donoghue v. United States*, 289 U. S. 516, 547 (1933).

The fact is that the national power of Congress over the District does not spring from Article I, Section 8 Clause 17, but rather it is the same power which Congress has over all of the United States, that is, that which is given it under all of the provisions of the Constitution.[15] This national power is carved from the general mass of legislative powers originally possessed individually by the States.

On the other hand, the local power which Congress has over the District under Art. 1, § 8, Cl. 17 is analogous to the power possessed by a state over its citizens. That it is local becomes clear when we consider the fact that the District was carved out of the territory formerly belonging to the States of Maryland and Virginia, and, as provided in Clause 17, by the cession of these two States. Although prior to the cession, Congress possessed national power over that exact area, it had no local power over it. The cession pursuant to Article I, § 8, Cl. 17 stripped Maryland and

[15] The remarks of Chief Justice Marshall in *Cohens v. Virginia*, *supra*, that Congress has the power to pursue a felon into a State without the necessity of demanding him from the executive power of the State clearly demonstrates that he was speaking of the national powers of Congress in the sense outlined above, for certainly the right of the United States to pursue one who has committed a crime against the United States is not limited to crimes committed in places ceded by a State. This right is operative throughout the entire United States, the District of Columbia and the Territories. (See brief of The United States at p. 34.)

Virginia of all their power over the ceded territory and vested it exclusively in Congress. At that point, the national power which Congress had theretofore possessed was implemented by those additional powers which Maryland and Virginia alone had formerly possessed. It received no greater powers, however, since Maryland and Virginia had none other to give. See *U. S. v. Curtiss Wright Corp.*, 299 U. S. 304, 315 (1936).

Thus, if in passing the Act of 1940, Congress purported to act under Article I, § 8, Cl. 17, it exceeded the authority granted it by that clause. If, however, it acted under its national powers received from the other provisions of the Constitution, then it was likewise limited by those other provisions. One of those other provisions is Article III, Section 2 which, we say, forbids such legislation.[18]

In *O'Donoghue v. United States*, 289 U. S. 516 (1933), Justice Sutherland held that prior to the cession of the territory comprising the District, Congress was empowered to create Article III courts in Maryland and Virginia. And the courts of the District, following the cession, were, therefore, held to be constitutional courts. But, he said, since Congress now has additional power over the District equivalent to that which Maryland and Virginia formerly had, then it could create courts and give them every power that Maryland and Virginia could give its courts. Congress, he said:

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[18] The national power of Congress over the District is analagous to its national power over aliens. Yet, though Congress has the supreme and complete power to legislate for and to protect aliens within the United States and to define their status and privileges (*Hines v. Davidowitz*, 312 U. S. 52 (1941)), it cannot vest the Federal Courts in the States with jurisdiction of suits between aliens since such jurisdiction is not authorized by Art. III, Sec. 2. *Hodgson v. Bowerbank*, 5 Cr. 303 (1809); *Montalet v. Murray*, 4 Cr. 46 (1807); *Bailiff v. Tipping*, 2 Cr. 406 (1805).

> " * * * has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature in conferring jurisdiction on its courts" (p. 545).

Thus, while Congress, in creating courts to sit in the District, may invest those courts with a further grant of diversity jurisdiction than is authorized by Article III, Section 2, it may not do so with the District Courts in the States, for Congress may not invest such courts outside the District with any jurisdiction not ceded to it by the States under Article III, Section 2. See *United States v. Hudson and Goodwin*, 7 Cr. 32 (1812); Ex parte *Bakelite Corp.*, 279 U. S. 438, 449 (1929); *Kellar v. Potomac Elec. Co.*, 261 U. S. 428, 442 (1923); *Kendall v. United States*, 12 Pet. 524, 619 (1838); *Postum Cereal Co. v. California Fig-Nut Co.*, 272 U. S. 693 (1927); *Kline v. Burke Construction Co.*, 260 U. S. 226, 234 (1922).[17]

Although, as pointed out in *Cohens v. Virginia, supra*, Congress may in certain instances enact legislation for the District which will affect other parts of the United States, yet it is necessary that such legislation have a national purpose which Congress is authorized to effect under other parts of the Constitution. As was said by Chief Justice Marshall at p. 429:

> "Whether any particular law be designed to operate without the District or not, depends on the words of that law. If it be designed so to operate, then the

[17] It has long been held that non-Art. III diversity power may not be given to constitutional courts. See *Hodgson v. Bowerbank*, 5 Cr. 303 (1809); 1 Moore, *Federal Practice* (1938) Sec. 0.08; Note (1946) 55 Y. L. J. 600. Petitioner and the United States assert that Congress may invest the federal courts in the States with non-Art. III judicial power. This may be true so long as such additional power is confined to federal "causes of action". But a case is not a federal "cause of action" simply because a citizen of the District is a party. See argument, *infra*, pp. 35-36.

question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the Constitution, requires a consideration of that instrument."

The mere fact that a citizen of the District will be affected does not make the purpose a national one.[18] The Chief Justice indicated clearly the scope of the national power over the District when he said in the *Cohens* case (p. 445):

> "Had Congress intended to establish a lottery for those improvements in the City which are deemed national, the lottery itself would have become the subject of legislative consideration."

And, he continued (p. 447):

> "We very readily admit, that the act establishing the seat of government, and the act appointing commissioners to superintend the public buildings, are laws of universal obligation. We admit, too, that the laws of any State to defeat the loan authorized by Congress, would have been void, as would have been any attempt to arrest the progress of the canal, or of any other measure which Congress may adopt. These, and all other laws relative to the District, have the authority which may be claimed by other acts of the national legislature; but their extent is to be determined by those rules of construction which are applicable to all laws. * * * "

And irrespective of the light in which the *Cohens* case is considered, we submit that this court has clearly ruled

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[18] Indeed such a contention would mean that every excise tax imposed upon the citizens of the District contravenes Art. I, Sec. 8, Cl. 1 (which provides that all "Excises shall be uniform throughout the United States"), and is therefore invalid. For if Congress in imposing such excise taxes is acting as a national and not as a local governing body, then it can lay such taxes on the District citizens if, and only if, it imposes a like tax on all of the other citizens of the United States. Cf.: *Binns v. United States*, 194 U. S. 486, 494 (1904); *Lawrence v. Wardell*, 273 Fed. 405, 408 (C. C. A. 9th, 1921); *Gibbons v. Dis. of Col.*, 116 U. S. 404 (1886).

in *O'Donoghue v. United States*, 289 U. S. 516, 546 (1933), that Art. I, §8, Cl. 17, does not empower Congress to extend the diversity jurisdiction of the Federal Courts outside of the District of Columbia beyond the grant contained in Art. III, Sec. 2. Justice Sutherland plainly announced that "in creating and defining the jurisdiction of the courts of the District, Congress (is not) limited to Art. III, as it is in dealing with the other federal courts." And in concluding that the courts of the District were both constitutional and legislative, he said:

> "Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior federal courts in the District of Columbia as in the States, whether it has done so in any particular instance depends upon the same inquiry — Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, Section 8, Cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere."

And further the court specifically held at page 547 that when Congress vested the Courts of the District with jurisdiction "not permissible under Article 3", it did so in the exercise of its power as a sovereign state under the provision of section 8 of Article I, noting that it could not impose such additional jurisdiction upon "other like courts functioning *outside* the District." (Italics added.)[19]

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[19] See further: *Kendall v. United States*, 12 Pet. 524, 619 (1838); *Postum Cereal Co. v. California Fig-Nut Co.*, 272 U. S. 693, 700 (1927); *Ex Parte Bakelite Corp.*, 279 U. S. 438, 449 (1929); *Williams v. United States*, 289 U. S. 553, 565 (1933).

Petitioner and the United States suggest that these remarks do not preclude the constitutional courts in the States from exercising judicial functions other than those enumerated in Art. III, Sec. 2. Citing *Williams v. U. S.*, 289 U. S. 553 (1933). While we recognize that this Court indicated in the *Williams* case[20] that such courts may judicially try certain cases which are not strictly Art. III, Sec. 2 suits, nevertheless this further grant of jurisdiction, as noted in the companion case of *O'Donoghue v. U. S.*, 289 U. S. 516 (1933), is expressly confined to *federal* as distinguished from *private* "causes of action". For Justice Sutherland said at p. 545:

> "The fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over *non-federal causes of action*, or over quasi-judicial or administrative matters does not affect the question. In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state. *Keller v. Potomac Elec. Co.*, 261 U. S. 428, 442-443. 'In other words * * * it possesses a dual authority over the District and may clothe the courts of the District not only with the *jurisdiction* and powers of federal courts in the several states but with such authority as a state may confer on her courts * * *.'" (Italics added.)

It is therefore apparent that the additional jurisdiction which can be conferred on the District Courts in the States is limited to litigation where a substantial federal interest is involved. Those cases, of course, are excluded which concern simply the adjudication of rights of private parties, and this is so even though one of the parties is a citizen of the District. The action obviously does not become a

[20] Cf. *United States v. Pfitsch*, 256 U. S. 547, 550 (1921); United States v. Sherwood, 312 U. S. 584, 591 (1941).

federal one simply because a citizen of the District is a party.[21]

A. Other Reasons for Holding Article I, §8, Cl. 17 Does Not Sustain the Act of 1940.

Even assuming, *arguendo*, that Article I, §8, Cl. 17 empowers Congress to legislate for District citizens irrespective of geographic boundaries and that it may, therefore, invest the Federal Courts in the States with jurisdiction to hear suits between citizens of the District, we nevertheless contend that Congress may not establish like courts to entertain suits to which a citizen of the District and a citizen of a State are parties. The advocates of the 1940 Act have completely ignored the salient point that the Act not only grants benefits to and imposes burdens upon the citizens of the District, but it operates in a like respect upon citizens of the States. That is, it would require citizens of the States to defend suits instituted by citizens of the District in the various district courts (as in the case at bar) and it would also permit a citizen of a State to sue a citizen of the District in those same courts. Congress, in the absence of a proper Constitutional amendment, is without power to impose these benefits and burdens upon the citizens of the States, for Article III, Sec. 2, clearly limits the Federal diversity jurisdiction, at least insofar as citizens of

[21] Cf.: *American National Bank of Washington v. Tappan*, 217 U. S. 600 (1910); *Bankers Trust Co. v. Tex. & Pac. Ry.*, 241 U. S. 295, 303 (1916). To accept the view of petitioner and United States would render inconsistent the two opinions of Justice Sutherland in the *O'Donoghue* and *Williams* cases, *supra*, which were written in conjunction with one another. Furthermore, if an action is considered federal because a District citizen is a party, would not an action between aliens, over whom Congress has plenary power (*Hines v. Davidowitz*, 312 U. S. 52, 66 (1912)), likewise be a federal action? But an attempt to give the federal courts in the States jurisdiction over cases in which aliens alone were parties has been held beyond the Congressional power. *Hodgson v. Bowerbank*, 5 Cr. 303, 304 (1809).

States are concerned, to those cases where a citizen of a "State" is opposed to a citizen of another "State". And for this reason alone, the Act of 1940 must fall. This fatal defect was aptly noted by the Court in *Central States Co-ops v. Watson Bros. Transportation Co.*, 165 F. (2d) 392, 397 (1947). There it was said:

> "* * * the reach of its terms (Act of 1940) is not confined to the citizens of the District of Columbia but includes with equal effect the citizens of all the States. It is hardly conceivable that Congress, broad as its powers may be with reference to the District of Columbia, can under the claim of exercising such powers legislate for the entire nation. Especially is this so concerning the judiciary where its power is expressly limited by Art. III;"[22]

[22] Much stress has been placed upon the statement of Judge Parker in his dissent below (R. 21) "that if Congress is not limited by the territorial boundaries of the country in creating courts to provide a proper administration of justice for citizens resident or doing business in foreign countries, such as consular courts * * * or the United States Court for China * * * there is no reason why it may not provide judicial facilities for citizens of the District of Columbia beyond the limits of the District." The point has been overlooked, however, that a United States consular court cannot render a judgment against a person of foreign birth, not a citizen of the United States (11 Op. Atty. Gen. 474 (1866)), or that the China Courts are without power to enter judgment in favor of a United States citizen against a citizen of China. *Wulfsohn v. Russo-Asiatic Bank*, 11 F. (2d) 715, 717 (C. C. A. China 1926); 7 Op. Atty. Gen. 496 (1855). This very circumstance is, as we have already mentioned, the conclusive fatal defect in the Act of 1940. For, the plenary power of Congress to create courts to hear suits to which a citizen of the District is a party being like the plenary power of Congress over the creation of consular and the China Courts, Congress cannot empower the former courts to hear suits and enter judgments in favor of a citizen of the District against a citizen of a State, without the consent of the States, which is the exact situation in the case at bar. The jurisdiction of a consular court extends only to that authorized by the treaty with the particular foreign power. See, for example, U. S. C., title 22, §183 (Consular Court in Persia). It should be noted that under the treaty with China, dated Jan. 11, 1943 (57 Stat. 767, 768), the China Courts have been abolished.

And the objection is even more far reaching. For, if it is decided that Congress has the power under Art. I, § 8, Cl. 17 to invest the Federal Courts in the States with the jurisdiction attempted to be conferred, then Congress likewise has the power under that same section to give those courts jurisdiction in any case where one of the litigants is a citizen of the District. And if Congress should so act, then it would follow that a citizen of Maryland could sue another citizen of Maryland in the Federal District Courts by the simple expedient of bringing in as a party defendant a citizen of the District of Columbia. And likewise, a Maryland defendant sued by a Maryland Plaintiff in a State Court could remove to the Federal Court by impleading as a third party defendant one who is a citizen of the District of Columbia. Such a result would be opposed to the suggested constitutional construction of the diversity clause that all parties on one side must be of citizenship diverse to those on the other side. *Treinies v. Sunshine Mining Co.*, 308 U. S. 66 (1939).

Again, however desirable it may be to afford District citizens access to the State Federal Courts, we are convinced that to hold that it is proper to do so under the Art. I, § 8, Cl. 17 theory would completely strip the State courts of jurisdiction over every case in which a citizen of the District is opposed to a citizen of a State. The power which Congress has over the District under that clause is "exclusive" and the least that can be said is that when Congress undertakes to act under that clause, the States are completely ousted of every jurisdiction and power they formerly possessed. Alexander Hamilton in *The Federalist* (No. XXXII) expressed this view with respect to this very clause. In that paper he assured the citizenry of New York that upon the adoption of the Constitution the State governments would retain all the rights of sovereignty which

they had previously had and which were not, by that act, exclusively delegated to the United States." "This exclusive delegation, or rather this alienation of state sovereignty", he said, "would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the union; where it granted an authority in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant. I use these terms", he continued, "to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different: I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of Constitutional authority". And in explaining the first grant of "exclusive" authority, he said: "the last clause but one in the eighth section of the first article provides expressly, that Congress shall exercise 'exclusive legislation' over the district to be appropriated as the seat of government."

And Mr. John Marshall, later Chief Justice, made the same comment in the Virginia debates on the Constitution.[23] In explaining that there was power in both Congress and the States to call forth the militia, he distinguished such concurrent power from an exclusive grant of power to Congress by saying:

[23] Elliot's *Debates on the Federal Constitution*, Vol. 3, p. 419. And see Chief Justice Marshall's statement in *Sturges v. Crowninshield*, 4 Wheat. 122, 193 (1819) that: "Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislatures, as if they had been expressly forbidden to act on it."

> "The exclusive power of legislating given them within the ten miles square is exclusive of the states, because it is expressed to be exclusive."

It is perfectly clear, therefore, that if Congress in passing the Act of 1940 has exercised a valid grant of power given it by Art. I, § 8, Cl. 17, it has from that very moment, at least, divested the State courts of jurisdiction over suits to which citizens of the District and citizens of a State are parties. Indeed, we would go even further and suggest that in that event, since Congress has had this exclusive power from the very inception of the Constitution, the State courts have never had jurisdiction over citizens of the District and every judgment rendered by those courts in cases to which such a citizen has been a party is void.[24] And would it not also follow that, since the State courts are without jurisdiction, there are even now many instances where no courts are available to the District citizens. The Act of 1940 purports only to grant jurisdiction in cases where a citizen of the District and a citizen of a State are involved. It does not encompass those cases where the action is solely between citizens of the District; nor does it provide a forum for the District citizens where the amount

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[24] See concurrence of the United States in this view at 33 of its brief *Amicus Curiae*. Cf.: *Shelley v. Kraemer*, 334 U. S. 1, 14 (1948) Art. I, Sec. 8, Cl. 17 also gives Congress similar exclusive power over forts, arsenals, dock-yards, etc. And it has been consistently held that the courts or legislatures of the States are without any power or jurisdiction to in any way affect such places. See *Western Union Telegraph Co. v. Chiles*, 214 U. S. 274 (1909); *Surplus Trading Co. v. Cook*, 281 U. S. 647, 652 (1930) ("'Exclusive legislation' is consistent only with exclusive jurisdiction"); *Ohio v. Thomas*, 173 U. S. 276, 281 (1899) ("the State Court had no jurisdiction to try the appellee"). *Quaere:* If Clause 17 is authority for the 1940 Act, might not Congress also legislate in the same manner with respect to residents of forts, arsenals, docks, etc. under the exclusive legislative power granted by that same clause over those places? And then might it not go even further and grant Federal jurisdiction in all those cases where certain federal employees are parties? Where will the line be drawn?

involved is less than $3,000 exclusive of interest and costs. Suffice it to say, the absurdity of these results makes it overwhelmingly clear that Art. I, § 8, Cl. 17 cannot sustain the Act of 1940.

Is is not undeniably clear, therefore, that the Act of April 20, 1940, is unconstitutional insofar as it attempts to extend the jurisdiction of the Federal District Court of Maryland to include suits between a citizen of the District of Columbia and a citizen of a State. Certainly, as we have shown, the Act cannot be supported under the theory that the District of Columbia is included in the term "States" in the diversity clause of Article III. We repeat that if Congress deems it unfair that citizens of the District may not litigate in the Federal Courts of the States, then let it propose an amendment to Art. III of the Constitution to care for that exigency.

As to the theory that Art. I, §8, Cl. 17,[25] will sustain the Act in question, we submit that the debates on the Constitution, as well as the unanimous decisions of this Court, demonstrate the limited scope of Congress' power thereunder. And an even stronger objection to an acceptance of the construction urged by Petitioner appears to be the repercussions which would result therefrom. Many grave constitutional questions would be sure to arise, e.g., the lack of jurisdiction of State courts in cases involving citi-

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[25] In our view the necessary and proper clause (Art. I, §8, Cl. 18) would be applicable only in the event that it should be decided that either Art. III or Art. I, §8, Cl. 17 supports the Act of April 20, 1940. Clause 18 is not a delegation of power in excess of those powers granted by other parts of the Constitution. That clause merely comes in aid of those other powers. If the Act of 1940 is not authorized under Art. III or Art. I, §8, Cl. 17, then the necessary and proper clause adds nothing to Petitioner's case. See *Legal Tender Cases*, 12 Wall. 457, 543 (1871); Alexander Hamilton, The Federalist, No. XXXIII.

zens of the District, and the power of Congress to impose excise taxes on those citizens while not imposing like taxes on all of the other citizens of the United States. And too, if Congress has the sweeping power claimed under Clause 17, what will prevent it from declaring that District citizens may vote since "justice and equality" dictate that they should be afforded representation in Congress as well as a voice in the election of the President. The dangers of construing this clause as being a grant of such unlimited power remind us of the grave doubts of many of our forefathers as to the propriety of including this clause in the Constitution without words of negation.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that the Act of April 20, 1940, should be held unconstitutional and that the judgment below should accordingly be affirmed.

Respectfully submitted,

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